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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KEVIN THONGSAY VILAYNGEUN, Defendant and Appellant.	A147306 (Contra Costa County Super. Ct. No. 51326040)

Defendant Kevin Thongsay Vilayngeun was convicted by a jury of first-degree murder (Pen. Code, § 187[1]) with a firearm enhancement (§ 12022.53, subd. (d)); shooting at an occupied motor vehicle (§ 246) with a firearm enhancement; conspiracy to commit robbery (§ 182, subd. (a)(1)) with great bodily injury and firearm enhancements (§ 12022.7, 12022.53, subd. (d)); and attempted robbery (§§ 211, 664). He was sentenced to an aggregate term of fifty years to life in state prison.

Defendant argues a new trial is required as a result of the following alleged trial court errors, either individually or collectively: (1) admission of DNA evidence based upon the inevitable discovery doctrine; (2) admission of text messages under the hearsay exception for coconspirators' statements; and (3) exclusion of evidence to impeach the testimony of a prosecution witness. We affirm.

[1] All further unspecified statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

Following the May 2013 fatal shooting of victim R.S., the Contra Costa County District Attorney filed charges against defendant and his codefendants Brittany Marie Bernard (Bernard) and B.M. [2] The People's theory was that, after a night at a casino, Bernard and B.M. lured the victim to another location so that defendant could rob the victim. When the victim resisted defendant's robbery attempt, defendant fired several shots at the victim. Although shot, the victim managed to drive two blocks before crashing his car; he was subsequently declared dead at the scene of the car crash. Defendant's defense was that another person murdered the victim.

Defendant and Bernard were convicted of the charged offenses together with firearm and great bodily injury sentencing enhancements; B.M. was acquitted of all charges. We summarize the evidence presented at the August—September 2015 jury trial that is necessary to resolve this appeal.

A. People's Case

1. Discovery of the Crime

At 7:12 a.m. on May 4, 2013, a ShotSpotter system alerted the police to gunshots fired at a residential street location in Contra Costa County. The police arrived at a roadway near the ShotSpotter location and found shattered car glass and six expended nine-millimeter bullet casings spread over an area measuring approximately 33 feet by 37 feet. A firearms expert testified the bullet casings were all nine-millimeter and had two different types of head stamps. The firing pin impression on all bullet casings indicated the bullets were fired from the same weapon, or multiple weapons, with similar class characteristics.

Approximately 500 feet away (two blocks from the ShotSpotter location), the police found a car crashed between two houses. The victim, who was the driver and sole occupant of the car, had sustained a fatal gunshot wound that entered the left side of his

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[2] We refer to the victim and certain persons by their initials to protect their privacy. (Cal. Rules of Court, rule 8.90(b).)

chest, perforated his heart and both lungs, and exited the right side of his chest. There was no muzzle imprint or gunpowder stippling near the entry wound, indicating the victim was not shot at very close range. The victim had $200.00 in a wallet and $83.50 in a pants pocket. Another $1,720.00 in cash was visible in the car's open sunglass holder. The car windows were broken and the airbags had inflated. The glass found in the street at the ShotSpotter location matched that of the front driver's side window. The damage to the other car windows was from the collision, not gunfire. There were four projectile impacts on the car driver's door consistent with gunfire.

After the victim's body was removed from the car, the police found three deformed nine-millimeter bullets: one on top of the driver's seat where R.S. had been sitting; one on the floorboard of the right front passenger seat; and one embedded in the right front passenger seat. A firearms expert testified the bullets were most likely nine-millimeter; a ballistic and crime scene reconstruction expert testified the bullet found on the driver's seat was the one that struck the victim. According to the crime scene reconstruction expert, the evidence was consistent with the shooter approaching on foot, initially firing while in front of the victim's car, and then continuing to fire as the car drove past and away. The spread of the glass on the ground also indicated that, during the course of the shooting, the victim's car was initially stationary and then driven away.

2. Witness to the Crime

R.C. testified he was at a residence near the location of the shooting. As R.C. left the residence that morning, he heard four or five gunshots coming from behind him. R.C. looked back and saw a green truck speeding on the same road where the victim's car had crashed. The truck made a turn, passed R.C. a few seconds later, and then turned left onto another street. From approximately 20 feet away, R.C. was able to see the truck's sole occupant, who he described as a man of Hispanic or Asian ethnicity, approximately 35 years old, wearing a "watchman cap" and dark colored coat, and lighting a cigarette. R.C.'s two 911 calls were played in open court and he identified defendant as the driver of the truck.

3. Police Investigation

The jury was shown casino surveillance videos and still photographs of the victim when he was last seen before his death. On May 4, 2013, at 3:41 a.m., the victim walked into the casino and, at 3:52 a.m., two woman walked into the casino. Approximately two hours later, at 6:46 a.m., the victim walked out of the casino with one of the women; several seconds later, they are joined by the second woman. The three individuals proceeded to walk in the parking lot. The two women then entered a car with a visible license plate number; and the victim entered his car. The two cars left the casino parking lot at 6:52 a.m., and the victim's car was ultimately found at a location fifteen minutes from the parking lot by car.

The prosecution played for the jury a police surveillance camera video showing two vehicles traveling six blocks from the location of the crash of the victim's car at approximately 7:15 a.m. on May 4, 2013, three minutes after the reported shooting. One car traveled westbound, and a small truck traveled westbound on the same road before turning southbound. The sole occupant of the truck was its driver; it was unclear whether the driver was the sole occupant of the car.

In June 2013, the police used the license plate number on the women's car to trace the car to H.N., its former registered owner. H.N. told the police that in April 2013, he sold the car to his son's friend, whom H.N. described as a Hispanic woman. H.N. signed the DMV sales slip and gave the woman the key, but the woman never paid for the car. The police contacted Bernard, who admitted she recently bought a car from H.N.'s son but had not paid for it. Bernard viewed photographs taken from the casino surveillance video and identified herself and B.M., as the women walking with the victim. Bernard described her relationship with defendant. The police later contacted B.M., who also identified herself in a still photograph as one of the women walking with the victim in the casino parking lot. B.M.'s cell phone had defendant's telephone number in the contacts section under the name "Thong," and Bernard's contact information was categorized as a "favorite."

Later in June, the police stopped defendant while he was driving Bernard in a green truck that appeared to be the one seen in the police surveillance camera video. Pursuant to a search warrant, the police searched defendant's residence, which was located approximately ten minutes by car from the location of the shooting. At the residence, the police found an April 2013 document which transferred title to a car from H.N. to Bernard, mail addressed to defendant, and clothing that appeared to be for defendant, Bernard, and a child. On August 28, 2013, the police observed the same green truck and a car parked outside defendant and Bernard's residence; the car had the same license plate number as the car in the casino surveillance video. The truck was registered to defendant's father and was later seen at defendant's father's residence on November 7, 2013.

The police arrested all three defendants on October 2, 2013. The jury heard an audio recording of the defendants while they were in a jail transport van following their arrests. Bernard asked B.M. what B.M. said to the police. Defendant said that the next time the police question B.M. she should keep silent or ask for a lawyer because if she tries to say something "they gonna like catch you . . . like bite you in the ass later." Defendant also said the police knew his "nickname was Thong," and that when the police spoke with him they asked, " 'Do you have any nicknames?' And I'm like, 'No. My nickname's Kevin,' 'like is your nickname Thong or what?' I'm like yeah." B.M. then repeatedly said, "It's in the texts." To which defendant immediately replied, "It don't matter – you could get anybody behind the phones. As long as they . . . ain't got no witness, right? . . . [j]ust like you . . . see on TV . . . how the Dodger fan just got killed at the . . . Giant's stadium. . . . They're left without sufficient evidence. They know he did it but they ain't got evidence he did it. They just tryin' to fuck with us. This is a scare tactic."

4. Cell Phone Evidence

Evidence was presented of text messages and telephone calls sent to and from cell phones with numbers associated with defendant, Bernard, and B.M. Because there is no

claim on appeal that defendants were not using their cell phones at the times in question, we recount the text messages and telephone calls as if they were made by defendants.

On the afternoon of May 3, 2013, B.M. sent several text messages about being broke and having credit problems to someone other than defendants. At 8:25 p.m. that night, B.M. and defendant exchanged text messages as follows: Defendant, " 'where you at.' " B.M., " 'casino . . . I'm in front.' " Defendant, " 'okay, we coming now. Stay where we can see you.' " B.M, " 'okay.' " At 8:54 p.m., B.M. sent a text message to someone other than defendants, " 'hanging at Thong's.' " At 9:01 p.m., B.M. sent a message to someone other than defendants, " 'okay. I still owe you la, I'm trying to make some money to pay you back.' "

In the early morning hours of May 4, 2013, before the shooting at 7:12 a.m., the following text messages and telephone calls were exchanged between defendant, Bernard, and B.M.:

5:03 a.m.: Bernard text to B.M., " 'where are you.' "

5:04 a.m.: Bernard call to B.M., and the call was answered.

5:10 a.m.: Bernard text to B.M., " 'I'll be over there in a bit. I'm talking to someone.' "

5:11 a.m.: Bernard text to B.M., " 'I'm trying to see if Thong want to rob him.' "

5:46 a.m.: Bernard text to B.M., " 'by the middle.' "

5:46:39 a.m. and 5:47 a.m.: B.M. text to Bernard, " 'where.' "

6:04 a.m.: Bernard text to B.M., " 'he's going to five [sic] me money.' "

6:06:08 a.m.: B.M. text to Bernard, " 'where I at.' "

6:06:35 a.m.: Bernard text to B.M., " 'on the other side. [Unidentified person] is at the cashier. Did you cashout my ticket?' "

6:07 a.m.: B.M. text to Bernard, " 'I lose.' "

6:19 a.m.: B.M. text to Bernard, " 'where you at?' "

6:38:24 a.m.: B.M. call to defendant; the call was not answered.

6:38:55 a.m.: Defendant call to B.M; the call was answered and lasted one minute.

6:54 a.m.: (two minutes after Bernard and the victim's cars left the casino): Bernard call to defendant; the call was answered and lasted one minute and 27 seconds.

7:02 a.m.: Bernard call to defendant; the call was answered and lasted 29 seconds.

Minutes after the shooting, the following text messages and telephone calls were exchanged between defendant, Bernard, and B.M.:

7:14 a.m.: Bernard's call to defendant; the call was answered and lasted 22 seconds. Defendant's number pinged to a cell phone tower within a coverage area that included where the victim had crashed his car.

7:15:12 a.m.: Bernard text to B.M, " 'we can't go back to SP for awhile.' "

7:15:55 a.m.: Bernard text to B.M., " 'or you can.' "

7:16:02 a.m.: Bernard text to B.M., " 'he won't recognize you.' "

7:18 a.m.: Defendant call to Bernard; the call was either answered or "rung out" without going to voicemail, and lasted 15 seconds.

7:28:47 a.m.: Bernard text to B.M., " 'don't say shit to nobody at all.' "

7:28:57 a.m.: Bernard text to B.M., " 'I mean it, no one.' "

On June 14, 2013, a different cell phone recovered from defendant's possession received the following text: " 'They got your and her text message.' " The response sent from defendant's cell phone read: " '[B.M.] better not fuck this up for us.' "

5. DNA Evidence

The chief forensic serologist at the Serological Research Institute testified about his DNA analysis of the six expended bullet casings found at the shooting scene. Defendant's DNA was found to be a "primary contributor" or "major donor" to "a very low quantity [of DNA] . . . probably less than 50 cells worth of DNA," found on bullet casing number five; there was insufficient information to compare the other small amounts of DNA found on that casing. The other five bullet casings had no DNA that matched that of defendant, Bernard, or B.M.; however, DNA of an unknown female was found on three of those five casings. The finding of defendant's DNA on the shell casing did not tell the examiner when the DNA was deposited or if defendant fired the gun.

6. Testimony of Jailhouse Informant K.E.

K.E. had been incarcerated with both B.M. and Bernard in county jail. K.E. and Bernard met in late 2013, they became friends in December 2013, and they became more than friends in the beginning of 2014. K.E. did not hear other people talking about Bernard's case and she did not ask other people about Bernard's case. However, Bernard spoke to K.E. on various occasions about Bernard's crimes and was told the following by Bernard. Bernard went to the casino at the suggestion of B.M. She had no money at the time. At defendant's request, Bernard found a person (the victim) to rob and convinced him to meet her outside the casino. Bernard drove with B.M. in one car, and the victim followed in his car. Bernard let defendant know she found someone to rob and where to meet them, and then waited for defendant at that location. Bernard heard screaming and turned to see defendant screaming at the victim to give him the money, but the victim refused. Defendant shot the victim approximately seven times as the victim tried to flee in his car, which he crashed. Bernard, scared, drove B.M. to B.M.'s house and then went home. Defendant showed up and said he shot the victim. Bernard showed K.E. photographs of herself in her car, which she hid at a friend's house; she also showed K.E. photographs of defendant in a truck that belonged to defendant's father. Bernard said there was a recording of her screaming at defendant and B.M. while the three were being transported together in a police vehicle. K.E. further testified that she had met B.M., who told her Bernard was not the person who killed the victim.

In January 2015, at which time the romantic relationship between K.E. and Bernard was over, K.E. contacted the district attorney's office with information about this case. K.E. had a prior juvenile adjudication for "grand theft person," and had been in custody since August 2013 on new charges following a preliminary hearing. On direct examination, K.E. testified she was facing 15 felony charges, including residential burglary, carjacking, robbery with a firearm, false imprisonment, kidnapping, and three sexual offenses. During cross-examination, K.E. detailed that she was charged with (1) first degree residential burglary in which it was alleged there were people in the house at the time of burglary and K.E. had or personally used a firearm; (2) first degree

residential robbery in which she used a firearm; (3) kidnapping for robbery in which she used a firearm; (4) residential robbery in which she used a firearm; (5) "another kidnapping for robbery and another use enhancement[];" (6) attempted forcible oral copulation during which she personally used a firearm; (7) attempted forcible rape with the "use of a handgun;" and (8) "another robbery" and "a carjacking." K.E.'s charges had not been resolved, and while she was not sure the charges were "enough to keep [her] for the rest of [her] life," she knew she was facing "quite a lot of time," and she was 22 and did not want to go to prison. While no one from the district attorney's office made any promises to her in exchange for her trial testimony, she confirmed there was "a possibility" that she would get something for her testimony, but her motive for coming forward was that she "just want[ed] to do the right thing." She had been told that if she testified at defendant's trial something "could possibly happen;" when asked if it would be "something good for you," she replied, "possibly"; when asked if it could be something that could "[g]et [her] out from underneath some of these charges," she replied, "possibly." When asked if she believed she had to "please the D.A. with [her] testimony," K.E. replied, "I'm just trying to do the right thing." K.E. denied she ever had an argument with Bernard or said she was going to get Bernard, and denied ever saying she would "do something" to Bernard or to either C.F., another inmate, or anyone else.

K.E. was questioned about her knowledge of the expression, "Tell on three, go home free." K.E. was familiar with the expression, but did not believe she used it when speaking with C.F. or other inmates. Nonetheless, she confirmed she had given the district attorney information on three murder cases: this case and information on two other murder cases from two other inmates, M.G. (with whom K.E. also had a relationship) and A.B. (a friend). K.E. testified M.G. had attacked her, but K.E. denied ever saying that she would get M.G. after the attack, and K.E. denied making such a comment to C.F.

B. Defense Case

No defendant testified at trial, but counsel for each defendant called several witnesses.

In support of defendant's theory that someone else had murdered the victim, the defense called M.R., who the jury learned had been convicted of possessing drugs while armed with a loaded firearm in 1991, felony check fraud in 1993, and "felony grand theft person" in 1997. M.R. was questioned about information on a website that included a biography of his life, including his use of the moniker, "Hook the Crook," and references to pimping and prostitution activities related to a documentary movie about life "on the streets" in which M.R. had played a small role. M.R. testified that when he was in elementary school, he used to wear a prosthetic hook on his arm and got caught stealing a pack of cookies; the kids started teasing him and calling him by the moniker Hook the Crook. However, on the website he stated he had the moniker due to selling fake jewelry as a teenager. After viewing photographs that appeared on the website, M.R. confirmed that the website explained he got the name Hook because he sold "fake hooks, they call them gold jewelry on the streets." When questioned whether the website advertised his current activity as a pimp, M.R. stated that 20 years ago he had acted as a pimp but was no longer pimping and explained that the references on the website to pimping and prostitution activities related to the documentary movie in which he had played a small role.

M.R. testified that he was outside an apartment building on the morning of the shooting and he heard tires squeak loudly from the direction of the shooting. Not wearing his glasses, M.R. looked down the street and saw a short African-American man with dreadlocks shooting at a white truck before the man ran into a nearby apartment building. The white truck came toward M.R., and then veered off and hit a residence. M.R. later described what he had seen to a police officer at the scene, but left as the officer acted disinterested. M.R. confirmed that the police report recounted he told the police that he did not see the African-American man fire a gun, but M.R. did not recall making that statement to the police. When asked if he told a defense investigator that he was so far away from the shooting he could not even see a gun in the shooter's hand, M.R. replied, "Well, I couldn't see the gun in his hand, but I seen the guy aiming it and I seen the guy shooting," but "No, I didn't see the gun in his hand, though." At this point

in the testimony, M.R. "held up his right arm, with a finger pointing out and his thumb up, mimicking a gun in front of him." M.R. confirmed the shooting was "a scary incident," so he could not remember everything that went on, but the main thing he did recall was "the black guy shooting at the car, that's all I remember." M.R. testified defendant was not the person he saw firing a gun.

To challenge K.E.'s credibility, the defense called as witnesses C.F. and C.R., both of whom had been in jail with K.E. and Bernard. C.F. had been convicted of giving false information to an officer in 2007 and vehicular manslaughter while intoxicated in 2014. C.R. had been convicted of two counts of driving a stolen vehicle in 2008, two counts of felony commercial burglary and one count of receiving stolen property in 2011, and two counts of driving a stolen vehicle in 2014. Both women testified they heard K.E. say, "Tell on three, go home free." C.F. also testified that K.E. said she was going to make sure Bernard spent the rest of her life in jail because K.E. was upset with Bernard for getting close to another woman in jail; talked about "telling on" another jail inmate, M.G., with whom K.E. had a romantic relationship; and asked other people about Bernard's case and M.G.'s case.

C. People's Rebuttal Case

Police Detective Daniel Campos testified he had spoken to M.R. for 20 to 30 minutes on the day of the shooting. M.R. said he heard three or four gunshots coming from the area near the shooting, saw a speeding white truck crash into a house, and saw an approximately 30-year old African-American man with dreadlocks run into an apartment complex near the shooting. M.R. did not describe the person's height and M.R. was not sure whether the running man had shot at the truck. A crime scene reconstruction expert testified it was approximately 644 to 654 feet from where M.R. parked his car to the area of shattered glass and bullet casings located by the police.

DISCUSSION

I. Trial Court Properly Denied Defendant's Motion to Suppress Evidence of his DNA Under Inevitable Discovery Doctrine

A. Relevant Facts

1. Search Warrant Documents

Following the June 2013 issuance of a "Ramey" warrant[3] to arrest defendant for murder and conspiracy, Detective Lacquanna Caston applied for a search warrant to secure defendant's DNA. Caston submitted a declaration describing the investigation to date and her opinion that probable cause existed for the issuance of a search warrant to secure defendant's DNA.

Caston averred, in pertinent part, that the police viewed the casino surveillance camera video and then located Bernard. Bernard confirmed that she and B.M. were the women seen on the video; and the relationships of Bernard, B.M., and defendant. The police secured warrants for the cell phone records of Bernard and B.M. and found the following text messages on B.M.'s cell phone: (a) from defendant on May 3 at 2025 hours, indicating he wanted to know where B.M. was; B.M. texted back, " 'Casino . . .IM in front,' " and defendant responded, " 'We coming now stay where we can see you,' " and B.M. replied, " 'ok.' "; (b) from Bernard to B.M. on May 4 at 0511 hours, " 'I'm tryna see if thong wanna rob him;' " and (c) from Bernard to B.M. on May 4 at 0715 hours, stating that B.M. could not go back to the casino and she was not to say " 'shit to nobody at all.' " " 'I mean NO ONE.' " On June 13, 2013, the police arrested B.M. After *Miranda* warnings, B.M. admitted to being at the casino with Bernard and B.M. identified herself in a casino surveillance video still photograph showing her walking with Bernard and the victim in the parking lot. B.M. also explained her relationships with defendant and Bernard.

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[3] "Before the filing of criminal charges, the court may authorize a residential arrest by issuing a so-called *Ramey* warrant (*People v. Ramey* (1976) 16 Cal.3d 263 . . .; now codified at Pen. Code, § 817.)" (*Goodwin v. Superior Court* (2001) 90 Cal.App.4th 215, 218.)

Under the heading "Statement of Opinion," Caston asserted: "[B.M.] and . . . Bernard left the . . . Casino with [the victim] the morning of the shooting. At the same time, **[defendant] also admitted to being at the casino just prior to the shooting of [the victim]**. A short time later (driving time and distance), [the victim] was shot and killed . . . ." (Bolding added.)

2. Defendant's Motion to Suppress Evidence

a. Parties' Motion Papers

Defendant filed a motion to suppress the DNA evidence on various grounds, including an assertion that Caston had included "materially false information" – defendant's admission to being at the casino just prior to the shooting – in her warrant application to create a link between defendant and the crime where none existed. He contended there was insufficient information to support issuance of a search warrant without the materially false information. He argued that suppression of the evidence could not be denied by applying the inevitable discovery rule because (1) Caston's misrepresentation was so "egregious" that applying the rule "would eviscerate the purpose of the exclusionary rule, and undermine the deterrent function of the warrant requirement;" and (2) viewing the information known to the police before the issuance of the search warrant, the prosecution could not prove the police would have inevitably secured defendant's DNA.

The People responded that the evidence of defendant's DNA was admissible under the "inevitable discovery" doctrine. According to the People, prior to, at the time, and after Caston had requested the search warrant, the police were pursuing separate investigations of the murder to gather evidence, including surveillance videos showing a vehicle matching the description of a vehicle owned by Bernard leaving the shooting scene immediately behind a truck matching the description of a vehicle that defendant had been seen driving; and evidence of K.E.'s statement in which she recounted Bernard's "confession of her involvement in the robbery and [d]efendant['s] . . . responsibility" for the shooting, which latter evidence alone met the requirement of demonstrating an independent source which would have led to the police securing

defendant's DNA to match against the unknown DNA found on the bullet casings recovered at the scene of the shooting.

b. Suppression Hearing

At the suppression hearing, the trial court heard testimony from Caston, the magistrate who had signed the search warrant (Hon. Terri Mockler) and the magistrate who had signed defendant's arrest warrant (Hon. Patricia E. Scanlon). Caston explained that her statement that defendant had admitted to being at the casino shortly before the shooting was "referencing" the cell phone text messages between defendant and B.M. speaking about "if [B.M.] could get a ride from the casino and [defendant] mentioning that he was on his way to pick [up B.M.]"

However, Caston agreed that those text messages were sent approximately 11 hours before the shooting, basically the night before the shooting. Caston also confirmed that defendant had, in fact, made no admission to the police that he had been at the casino shortly before the shooting. When asked if the magistrate who issued the search warrant requested further information concerning defendant's "admission," Caston only recalled that the magistrate asked how or why the detective made reference to the communications between defendant and B.M. that were made the night before the shooting, but the magistrate did not have an issue with the officer's "wording." The detective also confirmed that, in her earlier affidavit for an arrest warrant, she had included the same statement regarding defendant's "admission," but the magistrate who signed that warrant had not questioned the detective about it except to ask her "where the communications between [B.M.] and [defendant] had taken place." On cross-examination, Caston testified that both magistrates had questioned her about the statement she made concerning defendant's admission in the warrant, and she informed them that the statement was based on her earlier references in the affidavit to the text messages sent between defendant and B.M. "some" 10 to 11 hours before the shooting.

Judge Mockler testified she had no independent recollection of the search warrant. Nor did she have any recollection of any discussions with Caston concerning the paragraph containing the sentence that defendant admitted to being at the casino shortly

before the shooting. If the judge had a specific question about the sentence she would have asked a specific question. If the detective had offered an explanation of what a term within the document meant, the judge would have asked the affiant to write the additional information in the margin of the document and initial it.

Judge Scanlon testified she had a vague recollection of her issuance of the arrest warrant as she had also handled the preliminary hearing in the case. The judge's practice was to read the warrant and if she had any questions she would ask the affiant. As to the arrest warrant affidavit in question, the judge did not recall any conversation with the affiant; the challenged paragraph "looks like a fairly straightforward paragraph that doesn't elicit any questions on my behalf." The judge did not think it was possible that there was a discussion about the challenged paragraph because there was nothing in the paragraph that would have elicited a question. If the affiant attempted to explain information contained in the challenged paragraph, and it differed from what was in the paragraph, the judge would have asked the affiant to write the information in the margin of the document. The judge did not allow affiants to offer unsolicited information because the information supporting the warrant had to be written in the affidavit, so affiants did not give the judge any additional information unless the judge asked the affiant a question.

c. Trial Court's Ruling

Following argument by counsel, the court denied defendant's motion to suppress the evidence of his DNA. The court found that Cason's statement in her affidavit, that defendant " 'admitted to being at the casino just prior to the shooting,' " was "patently false," and was made with reckless disregard for its truth, based on the plain meaning of the word, "admission." The court further found that if the false statement were excised from the affidavit, the remaining information was insufficient to demonstrate probable cause to issue the search warrant to secure defendant's DNA. Nonetheless, the court found suppression was not warranted based on the inevitable discovery doctrine. In so deciding, the court found that, at the time the search warrant had been sought, there was an "entire investigation that was under way that truly was . . . independent" of the search

warrant and the results obtained from the warrant. Given the other outstanding search warrants, many of which concerned the securing of phone records, "those investigations or the expansion of that investigation would have led to another search warrant being issued in this matter." The court also found that a police interview conducted in 2015 concerning B.M.'s relationship with defendant, when coupled with what the police knew before the issuance of the search warrant, "alone would have . . . inevitably led to the issuance of a search warrant for [defendant's] DNA."

The court specifically rejected defendant's argument that the police behavior in this case was so egregious that it precluded application of the inevitable discovery doctrine as Caston's overall behavior did not rise to the level that would require the court to repudiate the inevitable discovery doctrine. The detective "had additional incriminating information about [defendant] – both [his] criminal history and the results of search warrants [for] phone records, that had been served prior to [June 24], and, for whatever reason, did not include [that information] in a search warrant [affidavit]. [¶] So if she were . . . [out] to get [defendant] or . . . override his constitutional rights, there's a lot more [she] could have [included] in [the affidavit] and [she did not]. So [the court] cannot reach the conclusion that [her] behavior in this case was so egregious, or even egregious enough, to warrant not applying that doctrine."

B. Analysis

"Under the inevitable discovery doctrine, illegally seized evidence may be used where it would have been discovered by the police through lawful means. As the United States Supreme Court has explained, the doctrine 'is in reality an extrapolation from the independent source doctrine: *Since* the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.' " (*People v. Robles* (2000) 23 Cal.4th 789, 800, quoting *Murray v. United States* (1988) 487 U.S. 533, 539.)

Defendant makes no argument, and no meritorious argument could be made, challenging the trial court's substantive decision that the People met their burden of demonstrating that the police would have inevitably secured evidence of defendant's

DNA evidence through lawful means untainted by the search warrant. Instead, defendant seeks relief on the sole ground that his case represents one of those "sufficiently egregious" situations of police misconduct such that the inevitable discovery rule should not apply. He correctly concedes, however, that the United States Supreme Court has not imposed any limitation on the use of the inevitable discovery rule even where the application of the rule "would, as a practical matter, operate to nullify important Fourth Amendment safeguards." While defendant contends the high court would "surely" impose such a limitation on the use of the inevitable discovery rule "in a proper case, this being one," we cannot agree.

In the seminal case of *Nix v. Williams* (1984) 467 U.S. 431 (*Nix*), the high court stated in pertinent part:

"The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.

"By contrast, the derivative evidence analysis ensures that the prosecution is not put in a *worse* position simply because of some earlier police error or misconduct. The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. . . . The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. [Citations.] When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a

functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, . . . the [rationale for the] independent source exception . . . is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule.

"It is clear that the cases implementing the exclusionary rule 'begin with the premise that the challenged evidence is *in some sense* the product of illegal governmental activity.' [Citation.] Of course, this does not end the inquiry. If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received. Anything less would reject logic, experience, and common sense." (*Id*. at pp. 442–444, fns. omitted.)

The high court specifically rejected an argument that the application of the inevitable discovery rule required the People to prove the police acted in good faith, or else " 'the temptation to risk deliberate violations of [the federal constitution] would be too great, and the deterrent effect of the Exclusionary Rule reduced too far.' [Citation.]" (*Nix*, *supra*, 467 U.S. at p. 445.) "A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered. . . . [And,] [s]ignificant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that the ultimate or inevitable discovery exception will promote police misconduct. [Citation.] In these circumstances, the societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce." (*Id*. at pp. 445–446.) Moreover, a "requirement" that the People must prove the police acted in good faith "would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity. Of course, that view would put the police in a *worse* position than they would have been in if no unlawful

conduct had transpired. And, of equal importance, it wholly fails to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice. Nothing in this Court's prior holdings supports any such formalistic, pointless, and punitive approach." (*Id*. at p. 445.)

Applying the high court's admonishments, we conclude the trial court did not abuse its discretion in denying defendant's motion based on the inevitable discovery doctrine as suppression of defendant's DNA would not "promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice." (*Nix, supra,* 467 U.S. at p. 447.) Detective Caston's conduct in securing the search warrant and her testimony at the suppression hearing "did nothing to impugn the reliability of the evidence in question" – defendant's DNA. (*Ibid*.; see *People v. Siripongs* (1988) 45 Cal.3d 548, 569 ["[a]s the People observe, even had the court ruled the blood sample unlawfully drawn, it could have later ordered a new blood sample to be drawn," and "the blood sample would have provided the same information whether drawn at the station or after the suppression hearing"].) Because the People met their burden of proving that the evidence of defendant's DNA would have been obtained through lawful means, its admission was proper "regardless of any overreaching by" Detective Caston. (*Nix*, *supra,* at p. 447.) The People "gained no advantage at trial and . . . defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct. . . . [¶] . . . "[W]hen, as here, the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible." (*Id.* at pp. 447–448; see *People v. Neely* (1999) 70 Cal.App.4th 767, 787 ["the desire to punish and deter misconduct by government agents must not be *over*valued"].)

We further note that, "[w]hen the admissibility of evidence is challenged as being the 'fruit' of an unlawful search and seizure," article I, section 28, subdivision (f)(2) of the California Constitution "requires us to follow the decisions of the United States

Supreme Court. [Citations.]" (*People v. Bennett* (1998) 17 Cal.4th 373, 390.) Section 28, subdivision (f)(2), to article I of the California Constitution, eliminates "a judicially created *remedy* for violations of the search and seizure provision of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled." (*In re Lance W.* (1985) 37 Cal.3d 873, 886–887.) The People of the State of California "have apparently decided that the exclusion of evidence is not an acceptable means of implementing [a defendant's constitutional Fourth Amendment rights,] except as required by the Constitution of the United States. Whether they are wise in that decision is not for our determination; it is enough that they have made their intent clear." (*Id.* at p. 887.)

We therefore conclude the high court's decision in *Nix*, *supra*, 467 U.S. 431, is dispositive, and requires us to affirm the trial court's denial of the motion to suppress the evidence of defendant's DNA under the inevitable discovery doctrine. The authorities cited by defendant are not binding on this court and do not warrant a different result. In light of our determination, we need not conduct a harmless error analysis.

II. Trial Court Properly Admitted Text Messages Under Hearsay Exception for Coconspirators' Statements

Defendant contends that the evidence of text messages before and after the shooting were not admissible because there was insufficient independent evidence to establish the existence of a conspiracy – and defendant's and Bernard's membership in that conspiracy – at the time of the sending of the text messages. We disagree.

Evidence Code section 1223, which codifies the case law governing the coconspirator exception to the hearsay rule, provides as follows: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and [¶] (c) The evidence is offered either after admission of evidence

sufficient to sustain a finding of the facts specified in subdivisions (a) or (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

As recognized by our Supreme Court in *People v. Leach* (1975) 15 Cal.3d 419 (*Leach*): "The independent evidence requirement is set forth somewhat awkwardly in subdivision (c) of Evidence Code section 1223 . . ., where it is stated that evidence of the declaration of a coconspirator is inadmissible hearsay unless the 'evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) [relating to the participation of the declarant and the defendant in a conspiracy, and the furtherance of that conspiracy by the declaration] or, in the court's discretion as to the order of proof, subject to the admission of such evidence.' The court's discretion as to the order of proof makes the putative requirement of an *advance* showing of the preliminary facts in effect a requirement of an *independent* showing, since the change in the order of proof is more generally the rule than the exception. [Citation.]" (*Leach*, *supra*, at p. 430, fn. 10.) Stated differently, while "[o]rdinarily there must be some proof of a conspiracy before the declarations of the [coconspirator] may be received . . .[,] . . . the trial court may, where it deems that the circumstances so require, relax the rule and permit the declarations to be received first, subject to the establishment of the existence of a conspiracy by independent evidence." (*People v. Morales* (1968) 263 Cal.App.2d 368, 374.) Thus, "where, as here, the facts from which the conspiracy [are] to be inferred are so intimately blended with other facts going to constitute the crime that it is difficult to separate them, it is not essential to the introduction of evidence of the acts and declarations of one of the conspirators that evidence should first be introduced to establish *prima facie,* in the opinion of the court, the fact of conspiracy. [Citations.]" (*People v. Matthew* (1924) 68 Cal. App. 95, 107.)

"Once independent proof of a conspiracy has been shown, three preliminary facts must be established: '(1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating *or would later participate in the conspiracy*.'

[Citation.]" (*People v. Hardy* (1992) 2 Cal.4th 86, 139, italics added.) "Section 1223 permits none of these facts to be established through the evidence of the declaration itself, save insofar as the content of the evidence must be considered in determining whether the declaration was in furtherance of what is established prima facie by independent evidence to have been the object of the conspiracy." (*Leach*, *supra*, 15 Cal.3d at p. 430, fn. 10.)

Under Evidence Code section 1223, "[t]he prosecution, as the proponent of the evidence, [is] required to lay an evidentiary foundation that the challenged hearsay statements were uttered during an ongoing conspiracy. 'In order for a declaration to be admissible under the coconspirator exception to the hearsay rule, the proponent must proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence. A prima facie showing of a conspiracy for the purposes of admissibility of a coconspirator's statement under Evidence Code section 1223 simply means that a reasonable jury could find it more likely than not that the conspiracy existed at the time the statement was made.' [Citation.]" (*People v. Thompson* (2016) 1 Cal.5th 1043, 1111 (*Thompson*).) "As a general rule, a conspiracy can only be established by circumstantial evidence 'for, as the courts have said, it is not often that the direct fact of an unlawful design which is the essence of a conspiracy can be proved otherwise than by the establishment of independent facts, bearing more or less closely or remotely upon the common design (5 Cal.Jur. 521); and it is not necessary to show that the parties met and actually agreed to undertake the performance of the unlawful acts (citing authority), nor that they had previously arranged a detailed plan . . . for the execution of the conspiracy (citing authority).' [Citation.]" (*People v. Steccone* (1950) 36 Cal.2d 234, 237–238; see *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135 (*Rodrigues*) ["[e]vidence is sufficient to prove a conspiracy to commit a crime 'if it supports an inference that parties positively or tacitly came to a mutual understanding to commit a crime' "].) " ' "The agreement in a conspiracy may [also] be shown by . . . conduct of the defendants in mutually carrying out an activity which constitutes a crime." ' " (*Thompson*, *supra*, at p. 1111.)

In arguing there was insufficient circumstantial evidence to make the required prima facie showing of conspiracy to allow admission of the text messages, defendant focuses on the trial court's reliance on Bernard's extrajudicial statement reported to K.E., which was admitted under the hearsay exception for a declaration against interest (Evid. Code, § 1220). He contends that while it was a declaration against interest, the evidence still remained a coconspirator's statement which, standing alone, could not met the independent evidence requirement; therefore, "if one strips away" the contents of all the text messages, as well as Bernard's extrajudicial statement reported by K.E., then "nothing remains to establish the existence of a conspiracy which [defendant] intentionally joined, in the hours prior to and just after the homicide, when the critical texts were sent."

Applying the above described law, we conclude that even if we exclude consideration of the content of the text messages and Bernard's extrajudicial statement as reported by K.E., the prosecution provided sufficient evidence from which the trial court could have found a prima facie showing that at the time of the text messages defendant was engaged in an ongoing conspiracy to rob the victim. Specifically, the prosecution presented evidence showing: (1) the relationship of the three defendants (*Rodrigues, supra,* 8 Cal.4th at p. 1135 [existence of conspiracy may be inferred from relationship of alleged coconspirators before the alleged conspiracy]); (2) communication (by text messages and telephone calls) during the night before and during the hours before the shooting, and the "nearly constant communication" immediately before and in the minutes immediately following the shooting "suggests an ongoing enterprise between" all three defendants (*Thompson*, *supra*, 1 Cal.5th at p. 1110; see *People v. Jurado* (2006) 38 Cal.4th 72, 121 ["[a]lthough there is no direct evidence that defendant and [an accomplice] discussed in advance the killing of [the victim], there was evidence that they were alone together" "shortly before killing, during which a discussion and agreement could have taken place"]; *People v. Garcia* (1962) 201 Cal.App.2d 589, 592 ["it is not necessary to prove a physical meeting of the coconspirators as long as the circumstances reasonably show that the conspiratorial agreement has been reached in some manner"]);

(3) the victim and Bernard and B.M. in the casino parking lot and then leaving caravan style to the location of the shooting; (4) the victim had large sums of money in his car after he left the casino; (5) defendant was a primary contributor of DNA on one of the bullet casings found at the scene of the shooting; (6) Bernard's car and defendant's truck immediately leaving the area of the shooting.

These items of evidence, considered together, show "a conspiratorial meeting of the minds" amongst the parties, including defendant, that can be found "by drawing reasonable inferences from the evidence." (*Thompson*, *supra*, 1 Cal.5th at p. 1111; see *People v. Stokes* (1907) 5 Cal. App. 205, 208–209 [a conspiracy is "usually established by independent facts, which, although they may be remote from the main subject of inquiry, and, standing alone, seem of little importance, but nevertheless when all are taken together are amply sufficient to establish a *prima facie* case of the existence of an agreement to commit a crime"].)

In sum, we conclude reliance on the content of the text messages and Bernard's extrajudicial statement as reported by K.E. was unnecessary to draw a reasonable inference of the existence of a conspiracy to rob the victim and that defendant was an active participant in that conspiracy at the time that the text messages were sent. Accordingly, we find no reason to disturb the trial court's ruling admitting the text messages under Evidence Code section 1223. In light of our determination, we need not conduct a harmless error analysis.

III. Trial Court Did Not Err in Excluding Certain Impeachment Evidence of Prosecution Witness K.E.

A. Relevant Facts

Both prosecutor and defense counsel filed motions in limine before trial concerning the scope of potential impeachment of K.E. Defense counsel sought to impeach K.E. concerning the specific conduct underlying the pending felony offenses against her that demonstrated moral turpitude, both by questioning K.E. and through the presentation of extrinsic evidence; counsel was particularly focused on the conduct underlying a July home invasion robbery as K.E. allegedly lied about a missing ring in

order to gain entry into a home in order to commit armed robbery. Defense counsel stated that if K.E. were to invoke her Fifth Amendment privilege regarding her pending cases, the defense was prepared to impeach K.E. with the testimony of the victims of the home invasion robbery. Defense counsel argued the court should allow broad impeachment of K.E. through both cross-examination and extrinsic evidence to insure a fair trial and right to present a defense and consistent with the Sixth Amendment right to confrontation and the Fourteenth Amendment right to due process.

At the pretrial hearings, which were held over the course of several days, the trial court extensively discussed the proposed impeachment. Defense counsel argued that questioning K.E. about "every allegation" of the home invasion robbery would be relevant because K.E. "befriended the people whose home she invaded. . . . It's her ability and willingness to take advantage of people that she knew." Counsel further argued that to limit questioning of K.E. to the nature of the charges "with nothing to show the strength of those charges," would put the defense "in a difficult position" because having the ability to show some facts underlying the charges through the testimony of the victims in those cases would allow the jury to know there is some basis for those charges.

In response, the prosecutor pointed out, among other things, that there was "a wealth of information" available to impeach K.E. and that to allow cross-examination of the underlying facts of the pending charges would "create a minitrial for no purpose." The prosecutor contended it was "difficult to see how the additional fact of the relationship between [K.E.] and the [victims of the robbery] in one . . . instance[]" "tips the scales of impeachment more in favor of allowing that fact in when . . . [K.E. was not] the one who called about the ring," but "in fact it was the girlfriend of [K.E.] [¶] . . . [W]e will be going through a lot of hoops to prove up, what I don't think is a very important fact, and the person is facing multiple robbery offenses and looking at life. And obviously, the thrust is, you received information from a fellow inmate, you are facing X amount of years, life in this situation, and obviously the cross is going to be [focused] upon her expectation, you've done this to get a deal, et cetera. [¶] So I think the Court does need to, in this situation, look at what the objectives are of the impeachment, i.e. . . .

getting out the fact [of K.E.'s] significant exposure and . . . wanting to get a benefit for providing information."

The court excluded questioning of K.E. or extrinsic evidence of the specific facts of the pending charges against her: "[W]ith respect to time consuming nature of trials within trials, [any time] conduct is used to prove up misconduct, requires testimony from witnesses. [¶] So regardless of which if any acts I allow to be proved up, the issue is still going to be one of [Evidence Code section] 352, as it would with any impeachment. [¶] . . . [¶] I will not permit any questioning about the open charges, other than the fact [of] the charges, the exposure of the charges, the hopes and expectation of [K.E.] with respect to her cooperation. [¶] In my view of weighing it under [Evidence Code section] 352, the defense has the right to challenge the credibility of [K.E.], and that's more than compensated for, it seems to me, through the prior conduct, which I'm allowing them to explore. [¶] Now the calculus will change if in any way [K.E.] buckles from anything having to do with the general questions I'm permitting about the current charges. [¶] If, for example, she says, 'Yeah I didn't do it,' the door is wide open. So it all depends on what she says. And I've seen it happen every combination you could think of . . . even to the most minimal detail sometimes. . . .[¶] . . . [¶] Just to perfect the record, I carefully evaluated this under [Evidence Code section] 352, in my judgment, . . ., proving up the open charges will take more time and it will be duplicative of impeachment, which already exists . . . ." After the trial court's ruling, Bernard's defense counsel did not seek to relitigate the matter, but stated "for the record" that he wanted to call only one witness to testify concerning the July home invasion robbery, to which the court replied: "Yes, but with respect to the record, it may be true with respect to the number of witnesses, it may not be. But the extent of the examination, if I were to allow you to impeach using the currently open charged case against [K.E.], would take . . . huge amounts of time;" "[the] number of witness[es] is certainly one factor to be considered, but the extent of examination is another factor to be considered;" and the examination will be more extensive without any question, "based on what I have been told about the currently outstanding charges."

B. Applicable Law

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 931, fn. omitted (*Clark*); see *People v. Quartermain* (1997) 16 Cal.4th 600, 623 (*Quartermain*).) "When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity . . . . [But,] [a]dditional considerations may apply when the proffered impeachment evidence is misconduct other than a prior conviction. This is because such misconduct generally is less probative of immoral character or dishonesty and may involve problems involving proof, unfair surprise, and the evaluation of moral turpitude. [Citation.] As [the Supreme Court has] advised, 'courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.' [Citation.]" (*Clark*, *supra*, at pp. 931–932.) Additionally, "[a] trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. [Citations.]" (*Quartermain*, *supra*, at pp. 623–624; see *Delaware v. Van Arsdell* (1986) 475 U.S. 673, 680.)

C. Analysis

We have no difficulty in concluding the trial court did not err in limiting impeachment of K.E. to exclude questions and extrinsic evidence concerning the specific facts of the charges pending against her at the time of the trial.

It is not disputed that evidence of charges pending against a prosecution witness at the time of trial is relevant for impeachment. (See *People v. Coyer* (1983) 142 Cal.App.3d 839, 842 ["pendency of criminal charges is material to a witness' motivation in testifying even where no express 'promises of leniency or immunity' have been made"].) Thus, the trial court allowed defense counsel to question K.E. about her status

at the time she gave information to the district attorney and her status at the time she testified at the trial. Specifically, defense counsel elicited that K.E. had not given a recorded statement to the district attorney's investigators until after she had been in custody for almost two years and was facing 15 felony charges, and at the time of trial K.E.'s outstanding charges were still pending against her and she believed it was "possible" she would receive some benefit regarding the resolution of those charges for her testimony at the trial.

Defendant argues however, that the trial court improperly curtailed his impeachment of K.E. by precluding questioning of K.E. or extrinsic evidence, concerning the underlying facts of the pending charges, and in particular one home invasion robbery. However, in *People v. Garrison* (1989) 47 Cal.3d 746 (*Garrison*), our Supreme Court concluded that the exclusion of a question concerning the specific nature of the charges pending against an in-custody informant is not error. (*Id*. at p. 774.) In *Garrison*, at the defendant's trial for a double murder, Joe Brown testified he had overheard defendant say that he was planning the double murder and the concealment of one of the bodies. (*Id*. at pp. 764, 774.) Brown, who had two prior theft-related felony convictions, admitted he had not offered information to the officers investigating the killings until he was arrested on new charges. (*Id*. at p. 764, fn. 5.) Brown denied he had been promised leniency in return for his testimony, but he admitted the disposition of his case had been continued for a full year and he hoped for lenient treatment at the conclusion of his testimony. (*Ibid*.) On appeal, the defendant complained that the trial court "did not permit defense counsel to elicit the specific offense for which Brown was in custody when he gave information to the police." (*Id.* at p. 774.) In concluding there was no error, the Supreme Court stated: "Counsel had established that Brown was confined in jail at the time of his statement and that the charge against him had not been disposed of at the time of trial. The exact nature of the charge was not material to his bias." (*Ibid*.) The Supreme Court further held that the trial court ruling did not "improperly restrict[ ] the cross-examination of Brown. Sufficient facts suggesting Brown's bias were disclosed so the jury could adequately weigh his credibility. [Citation.]" (*Id.* at p. 775.)

We find *Garrison, supra*, 47 Cal.3d 746, to be persuasive authority that the trial court here did not commit error by precluding defendant's counsel from questioning K.E. or presenting extrinsic evidence about the specific facts underlying the pending charges against her. Like in *Garrison*, K.E was in custody at the time of her statement to the district attorney investigators and the pending charges against her had not be resolved at the time of trial. Thus, the exact nature of the charges against her was not material to her bias. (*Id*. at p. 774.) As in *Garrison*, the record here demonstrates there was sufficient evidence suggesting K.E.'s motives to fabricate evidence against Bernard and other jail inmates so that the jury could adequately and appropriately weigh K.E.'s credibility without knowing the specific facts underlying the pending charges against her. [4]

We also find no merit to defendant's contention that the trial court's ruling violated his Sixth Amendment right to confrontation because the jury could not properly assess K.E.'s credibility without knowing the facts of one home invasion robbery; specifically, that she used her relationship with the victim to gain entry into the victim's home. In *Delaware v. Van Arsdall, supra,* 475 U.S. 673, our high court found that a trial court commits a violation of a defendant's Sixth Amendment right of confrontation when it prohibits a defendant from asking a prosecution witness about a key fact suggesting bias – dismissal of a criminal charge in exchange for testimony. (*Id*. at p. 680.) However, as we have noted, a constitutional violation occurs only when "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." (*Id*. at p. 680; see *Ibid*. ["the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire case"].)

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[4] In contrast, our Supreme Court later held in *People v. Mickle* (1991) 54 Cal.3d 140 (*Mickle*) that it was error to preclude evidence of a jailhouse informant's alleged threats against witnesses in his own case on the basis that it suggested he had a morally lax character from which the jury could reasonably infer a readiness to lie. (*Id*. at pp. 167–168.)

Here, we conclude defense counsel's proposed inquiry as to the specific facts of one home invasion robbery "would not have painted a materially different picture" of K.E.'s credibility. (See, also, *Mickle*, *supra*, 54 Cal.3d at p. 169 [inquiry into jailhouse informant's alleged threats against witnesses in his own case would not have painted a materially different picture of his credibility].) The jury was well aware that at the time K.E. gave information to the district attorney she had been held almost two years in custody to answer for multiple felony offenses, and at the time of trial she was still in custody on those charges and held a belief that she could possibly receive some benefit for her trial testimony. By the very nature of defense counsel's questions and K.E.'s answers, "the jury was fully apprised" of her possible "motives" for her testimony, which was, in part, "labeled false" by other inmates. (*People v. Alcala* (1984) 36 Cal.3d 604, 624 (*Alcala*).[5]) Thus, no constitutional error occurred as the jury could not have been under any misapprehension as to K.E.'s possible interest, bias, or expectation of leniency as to the pending charges.

Defendant separately contends the trial court's exclusion of impeachment evidence of the underlying facts of the charges pending against K.E., as compared to the allowed impeachment of M.R., demonstrates an "asymmetrical" application of the evidentiary rules in violation of his constitutional right to due process and a fair trial. He does not challenge the court's ruling concerning the allowable impeachment evidence used against M.R. He argues only that given the broad nature of the impeachment evidence allowed against M.R., the court should have permitted his counsel to impeach K.E. by questioning her about the specific facts of the pending charges against her. However, the People correctly argue defendant's asymmetrical argument is not preserved for our review. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 414 ["because the constitutional claims defendant now asserts do not simply restate his evidentiary claim on alternative legal principles, but instead require consideration of different circumstances—

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[5] "*Alcala* was abrogated by statute on another ground, as explained in *People v. Falsetta* (1999) 21 Cal.4th 903, 911 [89 Cal.Rptr.2d 847, 986 P.2d 182]." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1017, fn. 14.)

namely, the court's assertedly 'asymmetrical' treatment of the parties' use of hypothetical questions—he has forfeited the constitutional arguments for appeal"].)

We see no merit to defendant's contention that his asymmetrical argument is properly preserved for review because the "Fourteenth Amendment was raised in trial court briefing as to impeachment of [K.E.], separate from the Sixth Amendment Confrontation Clause," and "the parameters of the debate at trial – in reference to both state law and the Confrontation Clause – preserved the Due Process Clause issue for review." The record shows that, during the pretrial hearings, defense counsel argued that their request to question K.E. about the specific facts of her pending charges, was no different than the prosecution's proposed request to question M.R. concerning his "20 to 30 . . . convictions," none of which were more recent than 1998. However, at the time defense counsel made this argument, the court had not yet ruled on either the allowable impeachment of K.E. or the allowable impeachment of M.R. The trial court did not finally rule on the allowable impeachment of M.R. until after K.E. had testified as a prosecution witness subject to recall. If after the court ruled on the allowable impeachment of M.R., defense counsel believed the court had treated the impeachment of witnesses in an asymmetrical fashion, an argument could have been made at that time, the prosecution and the court would have had the opportunity to address it, and, if appropriate, the court could have modified its ruling including allowing K.E. to be recalled as a witness during the defense case or allowing counsel to produce extrinsic evidence. Under these circumstances, we decline to further address this forfeited claim, as we cannot hold "the trial court abused its discretion in rejecting a claim that was never made." (*People v. Valdez* (2004) 32 Cal.4th 73, 109; see *People v. Bryant, Smith, & Wheeler* (2014) 60 Cal.4th 335, 410 [the Supreme Court declined to entertain certain of defendants' appellate claims where their "failure to object *with specificity* prevented the prosecution and the court from addressing the relevance, probative value, and risk of undue prejudice or time consumption;" italics added].)

In sum, the trial court did not err in excluding impeachment of K.E., either through questioning or the admission of extrinsic evidence, concerning the underlying facts of the

charges pending against her at the time of the trial. In light of our determination, we do not conduct a harmless error analysis.

IV. Reversal for Alleged Cumulative Error Is Not Required

We reject defendant's contention that reversal is required based on the cumulative effect of the purported errors raised on appeal. We have found no errors in the court's admission of evidence of defendant's DNA, the admission of certain text messages under the hearsay exception for coconspirators' statements, or the court's exclusion of impeachment evidence. Accordingly, we do not further address defendant's cumulative error claim.

DISPOSITION

The judgment is affirmed.

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Petrou, J.

WE CONCUR:

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Siggins, P.J.

_____
Fujisaki, J.

A147306/People v. Vilayngeun